No. 100.

Brief of Hill for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Oct. 25, 1897.

No. 100.

THE VIRGINIA AND ALABAMA COAL COMPANY, SUING IN ITS OWN BEHALF AND FOR THE USE OF THE SLOSS IRON AND STEEL COMPANY, APPELLANT,

vs.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLANT.

The equity of Fosdick vs. Schall can not be defeated by the contrivance of a lease.

WALTER B. HILL,
N. E. HARRIS,
For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 100.

THE VIRGINIA & ALABAMA COAL COMPANY,

Appellant,

vs.

THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, *et. al.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF WALTER B. HILL & N. E. HARRIS for *Appellant.*

STATEMENT.

This was a suit for coal furnished by the Virginia & Alabama Coal Company, hereafter called the Virginia Company, and the Sloss Iron and Steel Company, hereafter called the Sloss Company, for the operation of the Central Railroad & Banking Company of Georgia, hereafter called the Central, while operated by the Richmond & Danville Railroad Company, hereafter called the Danville. All the coal was furnished within less than six months prior to the appointment of Receivers for the Central. The Central was leased to the Georgia Pacific; the Georgia Pacific was leased to the Danville; and the Danville under color of this lease was operating the Central.

On June 1st, 1891, the Central was leased to the Georgia Pacific Railroad Company ; (Lease, pp. 16-33), and on the same day the Danville (to which the Georgia Pacific was already leased) went into the possession of the Central and operated the same till March 4th, 1892, at which date the Receivers of the Central were appointed (pp. 2-3).

The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such fuel and other supplies as it then had in possession, and on the other hand obligating the lessees to pay the current debts of the lessor Company for supplies, etc. (Lease, p. 28.)

The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central. (Lease, pp. 26-27 ; clauses 2, 3 and 4.)

In connection with this clause in the lease, it is appropriate to notice at this point the agreed statement of facts (Record, p. 12-13 ; Clause 14) that the semi-annual interest on the Five Million Dollars of mortgage bonds of the Central was paid in January, 1892, (the order appointing the Receiver being dated March 4th, 1892.) It is also an agreed fact that during the Receivership the Central expended for betterments on its Railroad lines from the income of the roads during the Receivership, a sum much larger than the entire claim of the coal companies, (p. 13.)

To set aside this lease, Mrs. Rowena M. Clarke, a stockholder, brought her bill against the Central under which a Receiver was appointed March 4th, 1892. The Danville and Georgia Pacific disclaimed any rights under the lease, surrendered the property without attempting to assert any right to hold it, and no issue was raised in relation to the lease such as

to require a decree as to the validity or invalidity of the lease; and such question has not been determined. Shortly afterwards the Central filed a dependent bill, under which the same Receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad. (The last two companies were afterwards discharged from the Receivership, to-wit: On June 16th, 1893, p. 12.) The Farmers' Loan and Trust Company, the Trustee for the mortgage bondholders of the Central, afterwards filed its dependent bill in said cases under which the same Receivership was continued. All these cases were afterwards consolidated. The coal companies intervened; and are hereafter referred to as Intervenors.

On July 13th, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract is as follows: (p. 36.)

RICHMOND & DANVILLE RAILROAD CO.,

JOSEPH P. MINITREE, GENERAL PURCHASING AGENT. OFFICE GENERAL PURCHASING AGENT, ATLANTA, GA.

The Virginia & Alabama Coal Co.
Mr. J. R. Ryan, V. P. and G. M., Birmingham, Ala.:

DEAR SIR.—We beg to accept your verbal offer of to-day to furnish the C. R. R. & B. Co. of Ga. with say 275,000 tons of best quality engine steam coal for the next twelve months, commencing July 1st, 1891, and ending July 1st, 1892, at 90 cts. per ton of 2,000 lbs., to be delivered on cars at the mines and to be shipped at times and in quantities to suit. Settlements for the coal delivered in any one month to be made on or about the first of the second succeeding month; and the C. R. R. & B. Co. of Ga. reserves the right to increase or decrease the monthly deliveries upon reasonable notice at any time. The Division Superintendents of the Divisions for which the coal will be required will communicate with you as to the monthly deliveries, and all bills for coal furnished under this contract to be sent direct to the Division Superintendents. Kindly confirm this at once and oblige. Yours truly,

(Signed.) JOSEPH P. MINITREE,
July 13, 1891. *General Purchasing Agent.*

The Master found under the evidence that this was a contract with the Central. (p. 62, par. 6.) The finding was based on the contract itself, and on the testimony of J. R. Ryan, Vice-President and General Manager of the Virginia Company, who testified positively that he made the contract with the Central, and that he would not have contracted except with the Central. He stated that Mr. W. H. Green, the General Manager of the Danville (after negotiations as to the terms of the contract were completed), "wrote it out in the name of the Richmond & Danville Railroad, and I told him I was compelled to reject it. He told Mr. Minitree and said, 'you can contract with theCentral,' and that is all I know about it.'" (p. 93-94.)

Ryan further testified that "he (Minitree) told me he was Purchasing Agent of the Central Railroad also, or I would not have signed it, because I would not have accepted it as being made by the Richmond & Danville," (p. 94.)

"Nobody told me that they would take the contract in the name of the Central; I told them that I would not take it in any other way. I said: 'If you cannot make it in the name of the Central Railroad of Georgia, I cannot contract with you.' I was very explicit, because I expected to have trouble with the coal mines." (p. 98.)

The reason why the witness was so positive and explicit on this point was this: Various Southern Coal Companies had agreed not to underbid each other in the sale of coal to various corporations. The agreement was such as to give to each coal company the sale of the coal in its own natural territory (Ryan's testimony, p. 97), (Seddon's testimony, pp. 203-204.) Under this agreement the Virginia Coal Company was bound not to sell to the Danville; but was free to sell to the Central (Ryan's testimony, p. 97.) Ryan testifies that he was under a "moral obligation" not to sell to the Danville, which obligation he would not violate, (p. 98.); that he knew in a general way of the lease, but did not know its nature; did not understand that selling to the Central was the same thing as selling to the Dan-

ville ; was honest and sincere in making the contract with the Central, (p. 98.)

Afterwards Mr. Seddon, President of the Sloss Company complained that this contract had been made. He testified: "I went to Mr. Ryan and told him that I did not think I had been properly treated in that matter, that he had made a contract with the Richmond & Danville when he said that he would not. He said he hadn't made it, 'I refused positively to do it,' and says, 'I made the contract with the Central Railroad Company,' and said further that Captain Green and Captain Manitree said they had authority to contract for that company." (p, 204).

In pursuance of this contract the Virginia Company between September 16th, 1891, and March 4th, 1892, shipped to the Division Superintendents (Curran at Macon, Dill at Savannah, and Epperson at Augusta,) coal to the amount (per contract price of 90 cents per ton) of $26,607.44. The Sloss Company, under the same contract by the consent of both parties, supplied coal to the amount of $14,359.38. All bills were made out in the name of the Central (Ryan's testimony, p. 103).

It is an agreed fact that the coal was delivered by the Intervenor to the (R. R. lines of the) Central. (p. 61).

The price at which the Central got the coal was less than under the "strongest competition" ever existing in the south (Ryan's testimony, p. 103-104.) The Central made 20 cents per ton by the contract. (Seddon's testimony, p. 204).

E. P. Alexander, a director of the Central Railroad, testified that the lease of the Central and the taking possession thereof by the Danville, was a matter of common notoriety ; that after the lease the Central carried on no business except the banking business, and had no other employes except such as "were necessary to maintaining the organization of the Railroad Company which had parted by lease with its railroad lines and shops, or the maintaining of the same ;" that Joseph P. Minitree had no connection with the Central prior to the lease, but that

when the lease was made his jurisdiction as purchasing agent was extended over the Railroad lines of the Central by order of W. H. Green, General Manager of the Danville; (p. 150).

The Interventions (Virginia Company's p. 34, Sloss Company's p. 153,) set out the contract, the former Company suing (by amendment allowed) for the use of the latter. The Central, the Receivers thereof and the Danville (which had not then been placed in hands of Receivers) were made defendants. The defendants demurred. (Demurer by Central, pp. 48, 169, 170, by Danville, p. 49). The questions raised by the demurrers were reserved for the final hearing, (p. 50.)

None of the defendants filed answers.

By amendments (pages 51 and 172) intervenors alleged that while much of the coal was used in operation of the Central prior to the receivership, that a large part of the coal shipped was upon the bins of the Central at the time of the appointment of the Receiver, March 4th, 1892, and that some of the coal arrived after March 4th, and likewise went into the possession of the Receivers, and was worth in market value more than the contract price.

No answers were made to these amendments.

The Intervenors petitioned for the production of the books and documents (coal chute reports, etc.) which would show how much of the coal was on hand as above set forth. (p. 54).

In lieu of producing this documentary evidence, an agreement was made by Counsel for all parties that the Intervenors should appoint one expert, the Danville another, and the Central another, to investigate the matter and report. The Intervenors appointed C. H. Schoolar, the Danville W. B. Starke, and the Central was represented by the local agents in charge of each coal chute station when the investigation was made. (pp. 108, 113, 115).

The agreement was sanctioned by the Court. (p. 56–57.) The investigation occupied several weeks, was very "thorough

and careful," (Schoolar's testimony, p. 114,) and the reports made were unanimous. No dispute was made by the agents of the Receiver as to the correctness of the data for the report or the basis on which it was made. (Schoolar's testimony, p. 114).

After the reports were filed the Central only offered evidence tending to show an error in the amount on one bin. (p. 148, 149).

The Master's report finds that coal of the Virginia Company, worth $13,735.89, was used prior to the Receivership; that coal worth $6,700.50 was on the bins at the time of the appointment of the Receiver; and that coal worth $6,171.30 was received by the Receiver after his appointment; (Report p. 62–63, par. 9;) and that of the coal of the Sloss Company, coal worth $10,320.17 was used prior to the appointment of the Receiver; that coal worth $3,818.00 was on the bins March 4th, 1892, and that coal worth $776.00 arrived after the appointment of the Receivers. (Report, page 175).

The Circuit Court decreed that the Receivers of the Central pay for the coal which arrived after the Receivership; and no question is made by the petitioners here as to that.

The *pro rata* amount of the total coal of each Intervenor on the bins was arrived at as follows: The Virginia Coal Company being unable to supply the whole amount of coal under the contract, brought in three other companies, to-wit: The Sloss, Corona, and Little Warrior, to supply certain portions of coal under its coutract. No other company furnished coal to the Central within a year previous to the receivership. This was the finding of the Master (p. 63, par. 12). The only doubt thrown upon this fact arose from the testimony of C. H. Schoolar, (page 117), that he saw on the books of the Central while examining its coal records, the name of the Tennessee Coal and Iron Company. This doubt was removed by the testimony of the General Manager of that Company, that it furnished no coal to the Central within a year, and that it had

no claim to any of the coal on the bins (page 143). The coal of the four companies having been mingled in the bins, any separation was, of course, impossible; and they entered into an agreement *inter sese* that they would only claim as against the Receivers such part of the total coal on the bins as was in proportion to their respective debts (see agreement, page 142). This method of pro rating was the only method possible. C. H. Schooler testified, as an expert, that the method was fair and just to all parties. (p. 115).

A question arises in the case as to the price of the coal at which the Receivers should account for the value of the coal used by them, to-wit: that received by them after their appointment, as well as that which was on the bins. The average market value of the coal of the Virginia Company used by the Receivers at the places of delivery was $2.74 per ton, (Master's Report, p. 65,)making the coal so used worth $39,061.19, (Master's Report, p. 65). The average market value of the coal of the Sloss Company used by the Receivers was $2.50 per ton (Master's Report, p. 176) making the coal worth $12,077.56.

On this branch of the case the Intervenors contended that the Receivers could not claim the benefit of the low contract price without adopting the contract. The Central insisted that the value of the coal over the contract price was due to its freight, and that the freight was earned by the Central lines.

The Master found that the contract sued on was the contract of the Central, and that the debt of the Intervenors constituted a preferential debt under the rule of the case of *Fosdick vs. Schall*, and gave judgment to the Intervenors for the full amount of their claims against all of the defendants, and that upon the payment of the claims by the Central that Company should be entitled to recover the amount thereof from the Danville. (Report in the Virginia Company's case, (p. 58, 68). Report on the Sloss Company's case, (p. 172–179). He reduced the amounts by supplemental reports, (pp. 73, 180,) by deducting the value of the certain coal used from the Central's bins at Augusta by

the Port Royal & Augusta R. R., the Port Royal & Western Carolina R. R., and the Charlotte, Columbia & Augusta R. R.

All the defendants excepted to the Master's Report. (Exceptions of the Central, pp. 77, 182; Exceptions of Danville, pp. 74, 181). The Intervenors excepted to the Supplemental Report. (pp. 76, 193). They insist that the railroads mentioned (except the Charlotte, Columbia & Augusta) were controlled by the Central through a stock ownership, and were part of the Central system. These corporations stated in their answers that the Central controlled them by a stock ownership. (p. 10–11.) They were discharged from the Receivership, June 16, 1893. (p. 12). Intervenors insist that the coal they used was used prior to the latter date.

The Circuit Court set aside the Master's Report and held the Central and the Receivers liable only to the extent of the coal which arrived after March 4th, 1892, and for that, holding them liable to the contract price. (Opinion p. 231, Decree p. 236). The Intervenors appealed.

The Circuit Court of Appeals reversed the judgment of the Circuit Court. Their opinion is found in Record p. 254–258, and 66 Fed. Rep. 803. It is reprinted herein for convenience of reference.

STATEMENT OF THE CASE BY PETITIONERS CONTROVERTED.

It is stated on page 3 of the petition for *certiorari* that "a succinct statement of the facts and issues in the case, *as presented to the Circuit Court of Appeals*, is hereto attached as Exhibit B, and made part of this petition."

Exhibit B is a reproduction of the statement of the case made in the briefs of counsel for the Central Railroad Company, in the Circuit Court of Appeals, except that it superadds at the end thereof the following new paragraph:

(23.) It is not true, as petitioners are advised, that it appears from the record that there was a diversion of the income from the earnings of the leased railroad to the payment of the interest on the bonds of the Central R. R. & B. Co. of Georgia, in January, 1892, within the meaning of the rule in Fosdick's case. What the record discloses is that the lessee had transferred to it, under the lease, not only the road, but the income from several million dollars of stocks and bonds owned by the Central Company, which was more than sufficient to pay the interest on its mortgage debt (printed transcript, pp. 18–22). And that the lessee agreed to pay, as part of the rental, the interest on the mortgage indebtedness of the Central Company (printed transcript, p. 26), and that the interest on the mortgage debt falling due in January, 1892, was paid. This is the full extent of the stipulation in the record on this point (printed transcript, p. 12, clause 14). The contention of the Central Company, as made by the record, is that the income of the railroad during that period was appropriated by the Danville Company, and that issue is pending elsewhere (printed transcript, p. 8).

An examination of the statement of the case and brief of the argument made in the Circuit Court of Appeals by the appellee (the petitioner here) will show that no such contention was intimated or urged in that court.

It is enough to say that the record does not support this new contention.

The references made by petitioner are to pages 18 and 22 of the printed record. Nothing is shown by these references to the lease except that by its terms the Central turned over certain stocks and bonds to the lessee company. There is no evidence whatever that the latter company ever received one dollar of income therefrom; paragraph 23 above quoted rests upon a mere inference, wholly unauthorized; an inference not even suggested in the Circuit Court of Appeals. That Court found the fact to be as follows:

"In this case the equities are especially favorable to the intervenors, for it appears that there was a diversion of the income for the payment of the interest on bonds of the Central

Railroad in January, 1892, some two months before the Receivers were appointed; and it also appears that the Receiver expended from the income for improvements on the railroad property a sum much larger than the claims of the intervenors." (257.)

DECISION OF THE CIRCUIT COURT OF APPEALS.

For convenience of reference, the decision under review is here printed. It is found in Record p. 254–8, 66 Fed. Rep. 805–7.

The statement of the case by the Circuit Court of Appeals, is as follows:

"This is a suit brought by intervention for coal furnished by the intervenors, the Virginia & Alabama Coal Company and the Sloss Iron & Steel Company, for the operation of the Central Railroad & Banking Company of Georgia while being operated by the Richmond & Danville Railroad Company. All the coal charged for as furnished before the appointment of receivers for the Central Railroad Company was furnished within less than six months prior to such appointment. The Central Railroad was leased to the Georgia Pacific Railroad Company; the Georgia Pacific was leased to the Richmond & Danville Railroad Company; and the latter company, under color of this lease, was operating the Central Railroad lines. On June 1st, 1891, the Central was leased to the Georgia Pacific Railroad Company; and on the same day the Richmond & Danville, (to which the Georgia Pacific was already leased) went into the possession of the Central and operated the same till March 4th, 1892, at which date the receivers of the Central were appointed. The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such cash and credits as were then due, and on the other hand obligating the lessees to pay the current debts of the lessor company for supplies, etc. *The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central. It appears from the agreed*

statement of facts that the semi-annual interest on the $5,000,000 of mortgage bonds of the Central was paid in January, 1892, (the order appointing the Receiver being dated March 4th, 1892.) It is also an agreed fact that during the receivership the Central expended for betterments on its railroad lines, from the income of the roads during the receivership, a sum much larger than the entire claim of the intervenors. To set aside the lease, Mrs. Rowena M. Clarke, a stockholder, brought her bill against the Central Railroad under which a receiver was appointed March 4th, 1892. The Richmond & Danville and Georgia Pacific Companies disclaimed any rights under the lease, and no issue was raised in relation thereto such as to require decision as to the validity or invalidity of the lease, and such question has not been determined. Shortly afterwards the Central Railroad filed a dependent bill, under which the same receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad. The Farmers' Loan & Trust Company, the trustee for the mortgage bondholders of the Central Railroad, afterwards filed its dependent bill in said cases, under which the same receivership was continued. All these cases were afterwards consolidated. On July 13, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract stipulated for 90 cents per ton of 2,000 pounds, to be delivered on cars at the mines, and to be shipped at times and in quantities to suit. In pursuance of this contract the Virginia Company, between September 16, 1891, and March 4, 1892, shipped to the Division Superintendents (Curran at Macon, Dill at Savannah, and Epperson at Augusta), coal to the amount (per contract 90 cents per ton) of $26,607.44. The Sloss Company, under the same contract, by the consent of both parties, supplied coal to the amount of $14,359.38, but at an agreed price of 95 cents per ton. All bills were made out in the name of the Central Company. The price at which the Central Railroad got the coal was 7 or 8 cents per ton less than the market price at that time. It appears that while much of the coal was used in the operation of the Central Railroad prior to the receivership, a large part of the coal delivered was in its bins at the time of the appointment of the receivers on March 4, 1892, and went into their possession and was used by them, and that some of the coal was received after that time, and likewise

went into the possession of the receivers. *An agreement of counsel is found in the record as follows: 'It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the intervenor to the railroad lines of the Central Railroad & Banking Company of Georgia, which was being operated by the Richmond & Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown by said exhibits.'* It, however, appears that some of the coal delivered to the Central Railroad was used by several other railroads known as the Port Royal & Augusta, the Port Royal & Western Carolina, and the Charlotte, Columbia & Augusta Railroads. The Master's Report finds that coal of the Virginia Company worth $13,735.89 was used prior to the receivership; that coal worth $6,700.50 was in the bins at the time of the appointment of the receiver, and that coal worth $6,171.30 was received by the Receiver after his appointment, and that, of the coal of the Sloss Company, coal worth $10,320.17 was used prior to the appointment of the Receiver; that coal worth $3,818 was in the bins March 4, 1892, and that coal worth $776 arrived after the appointment of the receivers. The Circuit Court held the Central Railroad and the receivers liable only to the extent of the coal which was delivered after March 4, 1892, (holding them liable at the contract price), and rendered a decree accordingly. From that decree the intervenors appealed."

OPINION OF THE COURT.

"Before Pardee and McCormick, Circuit Judges, and Toulmin, District Judge.

"Toulmin, District Judge, after stating the case as above, delivered the opinion of the Court.

"From what appears in the record we are satisfied that the debts claimed by the intervenors for coal delivered prior to the appointment of the Receivers, were current debts for operating expenses of the Central Railroad lines, made in the ordinary course of business, to be paid out of the current earnings. The coal was purchased in the name of the Central Railroad. It was delivered on its lines, and was furnished for their operation, and, with the exception of a small amount was used by them, there was evidence that the contract for the purchase of the coal was

made by the Central Railroad, and the Master so found. The Circuit Court, however, differed with and overruled the Master in such finding.

" In our view of the case, it makes no difference whether the contract for the purchase of the coal was made by the Central Railroad or by the Richmond & Danville Railroad. The coal was delivered on the lines of the Central Railroad, and was furnished for and used in their operation. The Richmond & Danville Railroad Company had the possession of the Central Railroad lines, was operating them, collecting their revenues, and was under the obligation to pay out of their earnings the current expenses and the interest on their bonds. But whether that possession was lawful or otherwise, or whatever the relations between the two Railroads may have been, we think that the Central Railroad was liable for the necessary supplies furnished and used for the purpose of keeping its road in successful operation, and carrying on its business as a common carrier. Such debts are preferential, and the persons to whom they are due are entitled to have the income of the Receivership used in the payment of them, as the Railroad Company would have been bound in equity and good conscience to use it if no change in the possession of the property had been made. *Farmers' Loan & Trust Co. vs. Kansas City, W. & N. W. R. Co., 53 Fed., 182 ; Burnham vs. Bowen, 111 U. S., 776, 4 Sup. Ct., 675 ; Fosdick vs. Schall, 99 U. S., 235.* In this case the equities are especially favorable to the intervenors, for it appears that there was a diversion of the income for the payment of the interest on bonds of the Central Railroad, in January, 1892, some two months before the Receivers were appointed ; and it also appears that the Receiver expended from the income for improvements on the railroad property a sum much larger than the claims of the intervenors. Our opinion is, that the Receivers are liable not only for the coal which they received after their appointment from unloaded cars, but that they are equally liable for the coal which was in the bins at the date of their appointment, and which they took possession of and used in the operation of the Central Railroad lines, and that, as representatives of the Central Railroad & Banking Company of Georgia, they are also liable for the coal delivered to and used by the Central Railroad lines prior to their appointment, and which was then unpaid for. For that portion of the coal used at Augusta by the three railroads there, as

shown by the evidence, the Central Railroad and the Receivers are liable, except as to that used by the Charlotte, Columbia & Augusta Railroad. It appears that the other roads mentioned were under the control of the Central Railroad and were a part of its system. The Charlotte, Columbia & Augusta Railroad was not. It does not appear that the Court, in appointing the Receivers, made any provision for the payment of the intervenor's claims, but as there is evidence in the record showing that current earnings, before the Receivers were appointed, were diverted to paying interest on the bonded debt, and that after their appointment they made large permanent improvements on the railroad property, the intervenors should be allowed payment of their claims from the corpus of the property, should the earnings in the hands of the Receivers be insufficient to pay them.

"The intervenors are only allowed the price stipulated for, and which they expected to receive, when the coal was delivered, and which is, in fact, the price claimed in their petition of intervention. In our opinion, the view which the Circuit Court took of this case was an erroneous one, and the decree must be reversed, and the case is remanded to the Circuit Court with instructions to enter a decree in favor of the intervenors for the amounts respectively due them for coal delivered to the lines under the control and forming a part of the system of the Central Railroad & Banking Company of Georgia, as shown by the evidence in this case, including the coal furnished before the appointment of the Receivers, and that found in the bins at the time of such appointment, and of which the Receivers took possession, as well as the coal delivered to the Receivers after their appointment, the amount due being determined by the contract price, and an order that they recover from the Central Railroad & Banking Company of Georgia and the Receivers of the same, such sums thus found to be due. No decree will be entered in favor of the intervenors for the payment of that portion of the coal which was used by the Charlotte, Columbia & Augusta Railroad Company.

"Reversed and remanded." (66 Fed., Rep. 805-7.)

This case was reported February 25th, 2895. It has not been criticized or questioned. It has been cited with implied approval. *Northern Pacific R. R. Co. vs. Lamont, 69 Fed. Rep., 25.*

BRIEF OF THE ARGUMENT.

Although the Court of Appeals did not put their decision on the contract, our first contention is that

I.

The Central was liable on the express contract; especially in view of the fact that the Receivers of the Central adopted the contract by continuing to accept and use a large number of carloads of coal shipped in pursuance of the contract, and also in view of the further fact that the Circuit Court confirmed this adoption of the contract by allowing to the Receivers the benefit of the reduced contract price at the mines, which was much less than the market value of the coal at the places of delivery.

(*a*) The coal shipped in pursuance of the contract continued to arrive after the appointment of the Receivers, March 4, 1892. It is significant that the coal was so shipped that all which was in transit went into the possession of the Central's Receivers. As this coal continued to arrive during the months following their appointment, the Receivers were bound either to accept it and thereby adopt the contract or else to disaffirm the contract and reject the coal. They elected to do the former; accepted and used the coal; and thereby became liable under the contract, because they adopted it. *Sunflower Oil Co, vs. Wilson, 142, U. S. 313-322; Quincy, Missouri & Pacific Railroad Co., Humphreys 145, U. S. 82.*

(*b*) The contract price of the coal delivered to the Central was 90 cents per ton at the mines (p. 36.) The Sloss Company, by consent of both parties was to receive 95 cents per ton. This was lower than the market price at the time—the average market price being $1.02 per ton. (Master's Report, p. 176.) The average value of the coal at the places delivered was $2.50 per ton for the Sloss Company's coal, (Master's Report, p. 176), and $2.74 for the Virginia Company's coal. (Master's Report, p. 65).

(*c*) If the contract was not the measure of the rights of the parties, it is obvious that the Intervenors were entitled to recover the market value of the coal at the places of delivery. An amendment duly verified was framed to meet this view of the case (p. 51.) No answer was filed to the amendment.

(*d.*) The grotesque inconsistency of the defense then became apparent. Counsel for the Central who had hitherto insisted that the whole transaction was with the Danville now contended for the benefit of the terms stipulated in the contract; and sought to show on cross-examination that the enhanced value of the coal at the places of delivery was due to the haul "over the Central's own lines." (p. 201.) But it was shown while this was true of the haul from Birmingham to the points of delivery on the Central, the haul from tha mines to Birmingham was 25 cents per ton, and this haul was not over the Central lines, (p. 201.) These items must unquestionably have increased the liability of the Receivers for the coal they accepted and used, but for the fact that the Court which appointed them decreed them to pay the contract price, and thus sanctioned the Receivers' previous adoption of the contract.

The Receivers derived a large benefit under the terms of the contract. Of the Virginia Company's coal, they obtained for $6,171.30 coal worth at the places of delivery $18,661.89 (Master's Report, p. 65); and of the Sloss Company's coal, they obtained for $776.00 coal worth $2,032.56 (Master's Report, p. 176.)

(*e*) The foregoing applies with equal force to the large amount of coal on the bins at the time of the appointment of the Receivers.

"The Master's Report finds that coal of the Virginia Company worth * * * $6,700.50, was on the bins at the time of the appointment of the Receiver: * * * * and that of the coal of the Sloss Company * * coal worth $3,818.00 was on the bins March 4, 1892." (See decision Circuit Court of Appeals).

The above amount of coal of the Virginia Company on the bins was worth, in market value at the place of delivery, $2.74 per ton, or $20,399.30. (Master's Report 65). The Sloss Company's coal on the bins was worth $10,045.00. (Master's Report p. 176).

(*f*) The market value of the coal used by the Receivers, including that on the bins and that received by them after their appointment, exceeded the entire debt of the Intervenors under the contract; hence it was obviously to the interest of the trust in the hands of the Court to adopt the contract.

This appears from the following statement:

VIRGINIA COMPANY'S COAL.

Market value coal on bins	$20,399.30
Market value coal received by Receivers	18,661.89

SLOSS COMPANY'S COAL.

Market value coal on bins	10,045.00
Market value coal received by Receivers	2,032.56
Total value	$51,138.75
Virginia Company's entire debt, contract price	$26,607.44
Sloss Company's entire debt, contract price	14,359.38
Total debt	$40,966.82
Amount saved by adoption of contract, (assuming that Central pays entire debt)	$10,171.93

(*g*) The adoption of the contract in part necessarily implied the adoption of the whole. The contract was not divisible. "They could not accept what was beneficial and avoid what was burdensome." *Rader's Administrator vs. Maddox, 150, U. S. 128, 131.*

II.

The Central was liable, under the original contract made specifically in its name, and on its behalf by agents in possession of its property and franchises, for supplies necessary to enable it to perform its charter obligations.

(*a*) The written contract expressly binds the Central. (p. 36). It provides that the Virginia Company is to "furnish coal to the Central Railroad & Banking Company of Georgia" for the succeeding twelve months, and that "the Central Railroad & Banking Company reserves the right to increase or decrease the monthly deliveries." There is nothing upon the face of the contract to show any connection with the Danville, except the unimportant fact that the contract was written upon a letter-sheet having the name of the latter corporation at the top.

Contracts made with one corporation are not presumed to have been made with another. *Coggins vs. the Central Railroad Company, 62 Ga. 685.*

(b) The testimony of J. R. Ryan and Thomas Seddon, quoted in the statement of the case, shows that the contract was explicitly with the Central and explicitly not with the Danville. The Master so finds under the evidence. (p. 62. par. 6).

(c) The delivery of the coal was made to the Central, specifically, in pursuance of the contract. Such is the admitted fact.

"*It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the intervenor to the* (*railroad lines of the*) *Central Railroad & Banking Company of Georgia, which was being operated by the Richmond & Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown in said exhibits.*" (*p. 61*).

(*d*) If it were true that Ryan's *motive* in making the contract with the Central was to evade the agreement that bound

him not to sell to the Danville, that motive would not affect the contract actually made. The Central cannot defend against liability for supplies actually used in operating its lines on the ground that the agreement or combination made the contract unlawful.

In fact, the result of the combination was highly beneficial to the Central in that it secured coal at a lower rate than it had ever done under free competition. It is true that under the combination the price of coal was advanced to the Richmond & Danville up to one dollar and twelve ($1.12) per ton, but the Central got coal from the Virginia Company at 90 cents per ton. (pages 104, 204.)

(*e.*) The Central having put in possession of its property agents who assumed to act for it—having thus put it in the power of these agents to induce others to contract with them—"having permitted the lessees to conduct the business of the road in this particular, as if there were no change of possession—is not in a position to raise any question as to its liability for their acts."

In the case of *Railroad Company vs. Brown, 84 U. S. 446*, the lessor company was held liable to a passenger who held a ticket issued by the lessee in the name of the lessor company.

The Court said:

"The road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much servants of the company as of the lessees and receiver.

"Apart from this view of the subject, the ticket on which the plaintiff rode, was issued in the name of the Washington, Georgetown & Alexandria Railroad Company, as were all the tickets sold at both ends of the route. The holder of such ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that

Catherine Brown knew of any of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this railroad was run as railroads generally are, by a chartered company. Besides, the company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there was no change of possession, is not in a position to raise any question as to its liability for their acts." (p. 451).

(*f.*) The equity of the supply creditors, if loss must ensue to them or to stockholders and bondholders, is superior to that of the latter two classes.

The stockholders by the act of the majority and the acquiesence of the minority were responsible for the lease. The fact that it came to an end immediately upon the complaint of a single stockholder (p. 2, par. 4), shows that during its continuance the stockholders assented to the lease.

It requires no authority to show that as against them, the equity of the supply creditor must prevail. If Minitree was a wrong-doer in making the contract, they put him in the position to do the wrong. They cannot take advantage of their own wrong when sued by a party who supplied the corporation with means to fulfil its charter obligations. *Calais Steamboat Co. vs. VanPelts, administrator*, 67 *U. S.*, 572.

The bondholders might have assailed this lease which was so indefensible that when the Receiver was applied for, its lawfulness was not even asserted. (p. 3, par. 6.) But it is not necessary to discuss the equity of bondholders as if this were a case where there are two innocent parties and one must lose. The bondholders lost nothing. They got their interest in January, 1892, and they held their bonds with notice that the equity of *Fosdick vs. Schall* subjected their lien to the payment of the current supply indebtedness of the Central. The Danville did not allow any heavy debt for coal to accumulate ; all the coal

sued for was supplied in less than six months before the Receivership. The Danville did not buy a general supply of coal and assume to distribute it among the numerous lines of its system. It secured a rate greatly below the market price by making a special contract for the Central's supply exclusively. If the Central's officers had been directly in charge of its property, they could have done no better in its behalf. The bondholders, therefore, suffer no loss. The coal debt is one which would have existed and must have been paid in any event.

III.

Irrespective of the special contract, the Central was liable for the coal specifically supplied to and used upon its lines; and where the Danville diverted the revenues of the Central to pay the interest on the Central's bonds two months before the receivership, and where the receivers used the revenues of the Central in betterments, the coal companies are entitled to the restoration of the amount necessary to pay their debt.

To this effect is the decision of the Circuit Court of Appeals.

In their petition for certiorari, the petitioners stated the decision of the Circuit Court of Appeals as follows: (Petition p. 4).

"It is now for the first time laid down as a rule that when a railroad company leases its road to another company, it does so with the understanding that upon the abrogation or termination of the lease, the entire supply indebtedness and operation expenses of the lessee company which it may, through accident or design, leave unpaid becomes a charge and lien upon the property of the lessor company."

We respectfully submit that this is a perversion of the ruling made by the Circuit Court of Appeals.

That ruling cannot properly be interpreted except in connection with the facts of the case. The above statement leaves out of sight three important elements of the decision.

(*a*) Although the Court did not rest the case on the fact that the contract for the coal was made with the Central, the Court does call attention to the agreed fact that the *delivery* of the

coal was *to* the lines of the Central, and was 'furnished and used in their operation,' and the Court finds as a fact that '*the coal was purchased in the name of the Central Railroad.*'

(*b*) "It appears that there was a diversion of the income for the payment of the interest on the bonds of the Central Railroad, in January, 1892, some two months before the Receivers were appointed."

(*c*) "It also appears that the Receivers expended from the income for improvements on the railroad property a sum much larger than the claim of the intervenors."

It cannot be fairly claimed that the Circuit Court of Appeals has laid down a rule that is not limited by the facts in the case upon which the decision rests. So construed, the decision does not warrant the petitioners' representation of its legal intendment, but may be stated in the form of a syllabus, as follows:

"Where it appears that one railroad was operating another under color of a lease and that the coal used in running the engines of the lessor company was (not furnished to the lessee company as part of the coal used in operating its system of railroads but) furnished and delivered specifically to the lines of the lessor company; and where the lessee company diverted the income of the lessor company from the payment for such coal to the payment of the interest on the lessor company's bonds; and where shortly after such payment, a Receiver of the lessor company was appointed at the instance of a stockholder assailing the lease (neither the lessee nor lessor asserting its validity), which Receivership was extended to bills filed by the lessor company for liquidation and by the mortgage creditor for foreclosure; and where it was made to appear that a large part of such coal was on the bins of the lessor company when the Receiver took charge and that he used the same—that some of it was in transit and was received and used by the Receiver and for which the Receiver was decreed by the Court to pay only the contract price—that the remainder had been delivered to the lessor company only a few months prior to the appointment of the Receiver; and where it further appears that the Receiver had used for betterments on the railroad property a portion of the income greatly in excess of the claims of the creditors who supplied such coal; *Held*, that the entire claim for such coal is a preferential debt."

This case is one of peculiar and exceptional facts. It does not call for any general application of Fosdick vs. Schall to

leased railroads. All the circumstances of the transaction are out of the usual order. (a) Ordinarily, the lessee or operating railroad would purchase in its own name supplies for its leased lines, and distribute the same among the leased lines. (b) Ordinarily, the lessor and lessee in contemplation of the termination of the lease by lapse of time or agreement, would adjust the question of liability for supply debts. Here, there was an instantaneous surrender of the property by the pretended lessee.

Is it, in fact, a case of lease? The pretended lessee here was the Georgia Pacific Railroad Company which was at the time of the pretended lease already itself leased to the Danville, and which without a syllable of writing, turned over the possession of all the property of the Central to the Danville. The latter certainly cannot be said to have been the lessee of the property, in the ordinary sense. Although there was no final decree in the case of Mrs. Clarke against the Central in respect to the validity of the lease to the Georgia Pacific and the holding by the Danville, yet the Circuit Court by whom the Receivers were appointed refers in the decision hereafter quoted to the possession of the Danville as being that of a trespasser and usurper.

If, however, the Court admits that the case calls for the application of the rule in Fosdick vs. Schall to the case of leased railroads, the question arises what becomes of the equity declared in Fosdick vs. Schall in the case of a lease of one railroad to another.

This equitable rule with the limitations and restrictions placed upon it by later decisions is valuable and salutary; and certainly the equity cannot be defeated or destroyed by the contrivance of a lease.

If the doctrine were announced that bondholders could shield themselves from the equity of Fosdick vs. Schall by leasing the railroad upon which their bonds are issued to some other railroad, there would probably be a general resort to the scheme of

leasing in order to defeat this equity; and inasmuch as such doctrine would place the liability on the lessee alone, it is likely that some railroad which was insolvent, or as nearly so as possible, would be selected as the lessee or scape-goat upon which to load the supply indebtedness.

The railroad systems of the present day generally consist of a main stem and collateral leased lines. Ordinarily, the purchases for supplies would be in the name of the main stem, and these supplies would be distributed among the leased lines. Can it be asserted that in such case the main stem should be made exclusively liable for the entire aggregate of all supplies used by the system?

In the case of *Kneeland vs. Bass Foundry and Machine Works, 140 U. S. 592*, there is a strong intimation that each division in a system of railroads would be held responsible for the supply debts used thereon. It is true that in that case the general indebtedness fell upon the main stem, but this was only because there was a failure to show what liabilities belonged to the particular divisions. In the case at bar there is no difficulty on this subject, because the coal was bought for, delivered to and used upon the Central division.

In the case of Kneeland, *supra*, (page of decision, 597-598), this Court said:

"Another objection to the claim herein is, that, even admitting that it should be paid out of the fund arising from the sale of the road, it should not be entitled to payment out of the fund arising from the sale of the main line of the road alone, but should be distributed ratably among the several divisions of the entire systems of roads, according to a basis adopted by Special Master J. D. Cox, in 1884, with respect to the general liabilities of the entire system of roads under control of the several Receivers.

"It is quite true that the several Receivers had control of and operated the entire system of roads, and that these supplies were furnished them while they were thus in control of the

roads; but there is nothing in the record going to show specifically by what division of the road these supplies were used. Indeed, if any presumptions are to be indulged, it may justly be presumed that they were all used on the main line of the road from Toledo to East St. Louis. For the Court below being familiar with the basis of distribution of liabilities before referred to, and it not appearing anywhere in the record that they were not used on that division of the road it must, of necessity, be presumed that the order made by the Court, that they be paid for out of this fund was in accordance with the law and the facts of the case."

The administration by the Court of the Wabash System, as appears from the cases of *Quincy Company vs. Humphreys, 145 U. S. 82*, and *United States Trust Company vs. Wabash Railway Company, 150 U. S. 287*, shows that the Court recognized the Wabash System as composed of separate divisions, and directed the accounts to be so kept as to throw upon each division its respective liabilities, and only to permit payment upon its bonds when the income exceeded expenses. See also *Compton vs. Jesup, 167 U. S. 1.*

In this case the Circuit Court of Appeals rested the liability of the Central upon the true ground, to-wit, that the supply creditors were "entitled to have the income of the receivership used in the payment of (their debts), as the railroad company would have been bound in equity and good conscience to use it, if no change in the possession of the property had been made."

Counsel for the Central do not claim that the supply creditors are not entitled to the equity declared in *Fosdick vs. Schall*; but they assert that such equity exists only in this case against the Danville; but with what color of justice or equity could these intervenors seek to charge the income and corpus of the Danville with the payment of their debts? To such an attempt, would it not be a complete reply to say that the Danville did not in any way whatever get the benefit of the consideration of the indebtedness; that the bonds upon which indebtedness was paid out of the income derived from the operation of the

Central on January 1st, 1892, were not the bonds of the Danville but of the Central; and that the receiver who took the unconsumed coal on the bins at the time of the receivership and continued to accept it after the receivership was the receiver of the Central.

In point of fact, we are informed that certain supply creditors who had claims against the Danville incurred by reason of its operation of the Central endeavored to assert the equity of Fosdick against Schall in the Circuit Court at Richmond in case of Clyde and others against the Danville, and that it was held by the Circuit Court that such claims were not preferential debts as against the income or corpus of the Danville.

Even if there had been in this case a valid lease of the Central to the Danville, it is settled law that the lease of one railroad to another does not affect any of the obligations which the lessor company owes to the public; and one of these obligations is to continue the exercise of its franchises: *N. Y. &c. R. R. Company, vs. Winans, 17 How. 30.*

In *Harmon vs. the Columbia R. R. Company*, (*So. Ca.*), *5 S. E. R. 835*, the Court says: "We find it laid down by Mr. Justice Davis, in the case of *Railroad Company vs. Brown, 17 Wall 450*, as 'the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation, imposed by its charter or the general laws of the State, by a voluntary surrender of its road into the hands of lessees.' This doctrine was recognized and affirmed by this Court, in *Bank vs. Railway Company, 25 S. C. 222*, although the court in that case, not because any doubt was entertained as to the soundness of the doctrine just laid down, did state, merely as an additional reason for the conclusion there reached, that the contract there was made with the lessor and not with the lessee."

In this case the implied agency of the Danville to bind the Central for debts necessarily incurred in performing the charter

obligations of the Central to maintain its operations is stronger, we submit, by reason of the fact that the Central had turned over its entire property and management, not to a lessee, but to the Danville without authority under color of a lease to one of its own leased lines.

In the case of the *Macon Foundry and Machine Works vs. The Central*, the plaintiffs intervened for the recovery of a debt for repairs upon the locomotives of the Central, which repairs they were engaged to make by the agents of the Danville. There was no claim, as here, that the contract was made on behalf of the Central.

In this case the Court said: (Opinion by Judge Speer).

"The Central Railroad & Banking Company deliberately through the action of its Board of Directors, transferred its entire property to the Georgia Pacific Railroad Company, an insolvent corporation, in absolute violation of the law, and instantly, without a syllable of writing, turned over the entire property, not to the Georgia Pacific, but to the Richmond & Danville Railroad, which then operated it, collected all of its revenue and diverted the income in that way from the proper channel, and therefore held this property in contemplation of law as a trespasser. Now, the Central Railroad did that.

"The State had a right to expect, as I have said, that it would keep its property going as a great system of transportation, as was originally designed. The parties who took the property found it necessary, of course, to carry on the business of railroad transportation. In order to do that, they found it necessary to keep up the material equipment of the road. It was the duty of the defendant company to carry on the business; and if it selected, lawfully or otherwise, an agent to carry on the business for it, it is none the less responsible for the debt thus created, and it cannot primarily shift the obligation on the Richmond & Danville Railroad Company. The State had the right to expect when it chartered the Central Railroad, that it would perform its duties to the public, and one of these duties was the payment of debts due and contracted for the purpose of carrying on its business as a transportation company."

(This case has not been reported, but the foregoing extract is copied from the opinion, of which a certified copy is filed with this brief in the office of the Clerk of this Court.)

The authority of an illegal lessee as the agent of the lessor has been expressly upheld in the case of *Ottawa, Oswego & Fox River Valley Railroad Company vs. Black*, 79 Illinois, 262, in which the head-note is as follows, the head-note being the same as the language of the decision, on page 267:

"If a Railroad Company, without any authority to do so, leases its road to another company, the lessee will only be regarded as the servant of the company owning the road, and such company will not be by the act of leasing discharged from its contracts or released from any of its liabilities." To the same effect is the case of Hays against the same railroad. *61 Illinois, 123.*

IV.

The equity of the supply creditors was complete, because the income from the Central was diverted to the payment of interest on the Central's bonds two months prior to the Receivership, and to permanent improvements during the Receivership.

The income of the Central was diverted to the payment of interest on bonds of the Central prior to the Receivership during the time that the coal was being delivered; and after the Receivership a larger amount than the Intervenors' debts was used in making improvements upon the Central's lines.

To this effect is the agreed statement of facts. (Record page 15, clauses 14 and 15.)

In the case of *Burnham vs. Bowen*, *III U. S.*, 776, the Court held even in a case where there had been no division by the company or by the Receiver of the current earnings for the payment of interest on bonds, a debt incurred over eleven months before the appointment of the Receiver, for coal used in the company's locomotives, should be paid out of the income of the Receiver upon the ground that it was such a debt as it would have

been the company's duty to pay out of the net earnings if Receiver had not been appointed.

It is not necessary to our case to contend that division of income is not indispensible to create the equity; but there is authority to this effect. *Farmer's Loan & Trust Co. vs. Kansas City, W. & N. W. R. Co., 53 Fed., Rep. 182-189; Finance Co. vs. Charleston, C. & C. R. Co., 10, C. C. A. 323, 62 Fed., Rep. 205; Thompson on Corporations, Sec. 7118, p. 5643.*

The cases are not harmonious on this point; but an eminent judge has recently suggested a line of reconciliation. In the case of *Atlanta Trust Co. vs. Woodbridge Canal & Irrigation Co., 79 Fed., Rep. 39-41*, a distinction is made between the claims for labor expended in repairs and improvements in respect to which it is said they are entitled to preference only where there has been a division of income to pay interest, but that claims for labor and supplies necessary to keep the property a going concern will be given given preference even out of the *corpus* of the property, though there has been no diversion of income. The decision was by Judge McKenna, citing opinion of Chief Justice Fuller in *Finance Co. of Pennsylvania vs. Charleston C. & C. R. Co., 62 Fed., Rep. 205; 10 C. C. A., 323.*

This debt for coal is of the most favored class.

Even if there had been no diversion of income for the payment of interest on bonds; it would be enough that the income had been diverted for the payment of improvements on the railroad property.

"Persons who furnish labor, supplies and materials to a railroad, in order to keep it a going concern, are entitled to payment out of earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or *permanent improvements*, whereby the bondholders have been benefited, the Court will order an amount equal to the sum so diverted to be paid upon such claims out of

any earnings in the hands of the Receiver, or, failing these, out of the proceeds of the sale."

Finance Co. of Pennsylvania vs. Charleston C. & C. R. R. Co., 48 Fed. Rep., 188.

See, also, *Southern Railway Co. vs. Carnegie Steel Co., 76 Fed. Rep., 492, 498. Ib. vs. Tillett, 76 Fed. Rep., 507.*

V.

CASES CITED BY PETITIONER REVIEWED.

1. The cases of *Quincy Company vs. Humphreys, 145 U. S., 82, and U. S. Trust Company vs. Wabash Ry., 150 U. S., 287,* involve only the question of the adoption of an existing lease by reason of the retention of possession of the leased railroad by a Receiver. If they have any bearing, it is adverse to the petitioner.

(*a*) The Court recognized the separate divisions of the Wabash system and directed the accounts to be so kept as to throw upon each division its respective liabilities, and only to permit payment upon its bonds when income exceeded expenses.

If in that case a supply creditor had asserted an equity against a single division for supplies furnished to and used by it exclusively, it would have been in accord with the entire theory of the Court's administration to have decreed that payment thereof be made by that division.

(*b* The Court ordered the entire amount of preferential debts existing at the time of the receivership paid in preference to the mortgage.

(*c*) "The immense debt for supplies and other preferential claims here precludes the inference that there was any such diversion of earnings applicable to the payment of rentals." *145 U. S., 103.*

Here the Circuit Court of Appeals finds as a fact that diversion was made of earnings applicable to the payment of these supply debts.

2. The case of *Transportation Co. vs. Pullman Co., 139 U. S., 24*, does not sustain the point on which it is cited, and is wholly without application. The true rule in laid down in *Ottawa Co. vs. Black, 97 Ill., 262, supra.*

3. Petitioner also relies upon the case of *Clyde against the Richmond & Danville Railroad Company, 56 Fed. Rep. p. 540.* On examining this case, it will be seen to have no application. The *ratio decidendi* of that case is embraced in the following statements:

1st. In that case the intervenor had sued the Richmond & Danville Company *alone*, and had elected that Company as her debtor, and had merged her claim in a judgment against that Company. (*See page of Decision, 542.*) The case here is wholly different.

2d. No question could be made in that case as to the obligation of the Railroad Company to which the supplies were furnished, for the reason that that railroad was not a party to the case before the Court (which is not true here, because the Central, which is the railroad for which the supplies were furnished, is a party to this case); and also because in the Clyde case the mortgagees were not parties to the suit. That is not true here, because the mortgagees are parties, and have filed their bill in this case as dependent upon the original Rowena M. Clarke bill, and in their dependent bill asked the Court to continue the same receivership, which was done, and which case has been consolidated by order of the Court with the other cases in which the interventions were filed; and their counsel unite in the agreed statement of facts on which the case is heard. (*Record, p. 15.*)

VI.

The equity of the supply creditor is aided by the local law of Georgia.

(*a*) The act of the General Assembly of 1876, (Session Laws p. 122), embodied in the Code of Georgia, Section 2333 is as follows:

"*An Act to define the duties and fix the liability of Receivers appointed for Railroad Companies, in certain cases, and to create liens in favor of certain creditors, and provide for the enforcement of such liens, and for other purposes.*

"SECTION 1. *Be it further enacted, etc.*, That in all cases where the business of any corporation operating a railroad either wholly or partially in this State, shall by an order or decree of any Court, be placed in the hands of a receiver for the benefit of the creditors or stockholders of said corporation, it shall be the duty of said receiver to apply the income of said railroad to the payment of the incidental expenses necessary to the carrying on said business, which shall include the wages of employees, wood, cross-ties and other material furnished, and which may be necessary for conducting said business and keeping the property in repair, and the damages which may arise from the loss or injury to goods, wares and merchandise received by said road for transportation, and for injuries to persons and property caused by the running of the cars on said road, and for which said road is now liable, as common carriers, by the laws of this State, and a lien is hereby created on the gross income of said road, while in the hands of such receiver, in favor of such creditors or claimants, superior to all other liens under the law of this State.

"SEC. 2. *Be it further enacted*, That if said receiver should be removed, or a vacancy occur in said office, and a successor be appointed, it shall be his duty to pay the liens herein provided for according to their date, out of any funds in his hands as such receiver, whether such liability accrued before or after his appointment."

This Statute has been construed by the Circuit Court to apply to "incidental expenses necessary to the carrying on said business," *contracted prior to the appointment of the Receiver.*

In our brief in the Circuit Court of Appeals (page 23) we said :

"Although the decisions are not reported, yet, inasmuch as they are known to opposing counsel in this case, it is permissible to state that the court below has construed this Georgia statute to refer to the payment of current debts for supplies, etc., contracted prior to the appointment of the receiver ; and in pursuance of that construction the court has given judgment against the Central and its Receivers for wood and other materials furnished to the Richmond & Danville while it was operating

the Central, and which the Danville used in the operation of the Central. It is also proper to state that the court below distinguished his ruling in such cases from the decision which is the subject of the present appeal; though we are wholly unable to see the distinction."

Counsel for Appellees (the petitioners here) replied to the brief, but took no issue with the statement of fact above made.

Shortly prior to the enactment of this Statute, the Supreme Court of Georgia decided in *Henderson vs. Walker, 55 Ga. 481, Thurman vs. Cherokee R. R., 56 Ga. 376.* that a Receiver of a railroad was not liable to an employee for injury caused by negligence of a co-employee: (as railroads are liable in Georgia): and it was contended in the Circuit Court of Appeals by the appellees, (petitioners here) that the act of 1876 should be construed as intended to remedy the "evil" in that decision and others analagous to it; and that it was limited to liabilities arising during the Receivership.

This argument is completely met by a more recent decision of the Georgia Supreme Court in *Patterson vs. Central R. R. & B. Company 97 Ga. 152,* holding that the Act of 1876, did not affect the former cases in any manner.

The foregoing Statute is therefore to be regarded as a statutory adoption of the equity principle in *Fosdick vs. Schall.* In two respects, the Statute is more favorable to creditors than the equity rule has been declared to be in some cases: It places the rights of creditors upon the same footing whether the Receivership is for the benefit of the creditors or *stockholders* of the corporation. Under this Statute, therefore, the right of Intervenors to the judgment they sought, was independent of the Trustee of the bondholders becoming a party to the litigation and independent of the diversion of income. It is unnecessary, however, to insist upon this point, because both of the conditions referred to are present in this case.

(*b*) The Supreme Court of Georgia have gone to greater length than any other Court in favor of general creditors as

against mortgage creditors of insolvent railroads. In the case of *Green vs. Coast Line Ry. Company et al.*, 97 *Ga.*, 15, the Georgia Court holds:

"Mortgages upon a railway and the income from the same, the mortgagor being left in possession, are, as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponded in equity in favor of a claim for damages resulting from a *tort* committed by the mortgagor while and by reason of operating the railway after the execution of the mortgage."

This decision rests in part upon the statutes of Georgia, cited by the Court, page 24; and in part upon the principle which is stated in unique form on page 31:

"Benefit and burden are correlatives, and he who would appriate all a debtor has, must adopt such of his burdens as are fundamental to his debtor's rights to have existence and create any debt or incur any obligation whatsoever."

VII.

The evidence shows that the Central received the benefit of all coal shipped under the contract, by using the same upon lines which it either owned or controlled, except a small amount used by the Charlotte, Columbia and Augusta Road.

The Master found in his original report that all of the coal was used for the benefit of the Central; but modified his finding in a supplemental report, in which he reduced his original finding by deducting therefrom certain coal which was taken from the bins of the Central at Augusta, and used by three railroads—the Port Royal & Augusta, the Port Royal & Western North Carolina, and the Charlotte, Columbia & Augusta.

(*a*) At the beginning of the case the following agreement of counsel was made:

"It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the Intervenor to the (railroad lines of the) Central Railroad &

Banking Company of Georgia, which was being operated by the Richmond & Danville Railroad Company, till the 4th of March last, at the dates and in the amounts shown by the exhibits.

"This agreement is made with the reservation of the right to show and to prove any error in said exhibits should it hereafter be discovered."

This agreement was signed by Lawton & Cunningham for the Central, and Henry Jackson for the Danville, (page 61).

There never was any attempt afterwards made in pursuance of this reservation to prove any error in the exhibits as to the delivery of the coal along the lines of the Central, except as to trifling amounts. So far as concerns the coal that was used at Augusta by the three railroads above mentioned, that was properly delivered, because Augusta was the headquarters of Division Superintendent Epperson, to whom coal was consigned under the contract; and, therefore, the remark of the Circuit Court (page 232) that some of the coal was shipped to points with which the Central had no concern, and shipped direct to various agencies of the Danville, is contrary to the solemn agreement of counsel for the Central, that all the coal was delivered to the railroad lines of the Central Railroad & Banking Company of Georgia. We respectfully snbmit that on questions of fact the the case must abide by the agreements of counsel as to the truth of the case.

(*b*) The Master's report, in his seventh and eighth findings (pages 62 and 175), finds that the coal was delivered in pursuance of the contract and within its terms along the lines of the Central Railroad & Banking Company of Georgia.

(*c*) The report of the experts who represented the Intervenors and the Danville, and who testified that at each point which they visited they were assisted by the local agent whom the Central designated to assist them in making up their reports, shows that the coal (with exceptions which are trifling in quantity) was delivered along the lines of the Central Railroad & Banking Company.

(*d*) It was not even claimed by the Counsel for the Central in the exceptions which they filed to the Master's report, that any relatively large amount of this coal was diverted from the Central's lines. We omit for the present the question as to the liability for the coal taken at Augusta by the three railroads above mentioned, and refer to the exceptions filed by Counsel for the Central to the report in the Virginia case. (See item headed Recapitulation, on page 82, where it is claimed that 448 tons of coal was delivered to "miscellaneous corporations.") These miscellaneous corporations are shown on page 82. One of them, for instance, is the Crystal Ice Company. This is a corporation (see page 15) located at Columbus, Ga., which is one of the principal points of the Central lines; and the only legitimate inference to be drawn is that the officers operating the Central sold a small amount of coal to this Ice Company and doubtless received the money for it. The exceptions of Counsel for the Central to the report of the Master in the Sloss case (see Recapitulation, page 190) claim that of the Sloss coal twenty-nine tons were delivered to the Georgia Southern & Florida Railroad. This railroad has headquarters at Macon, one of the principal points on the Central lines, and the only legitimate conclusion from the evidence, is that this was a small temporary loan of coal by the Central to the Georgia Southern, which was either paid for or perhaps off-set by some temporary loan which the Central may have made from that railroad. It is a well known fact that Railroad Companies sometimes accommodate each other in small and temporary transactions of this kind.

The same remark applies to the small amount of twenty-five tons delivered to the Georgia Midland Railroad (page 84.) This railroad runs from Griffin to Columbus. Both of these points are on the lines of the Central, and this trifling transaction represents either the sale or the loan of twenty-five tons.

The exceptions quoted further claim that of the Virginia Company's coal 419 tons are "unaccounted for," and of the Sloss Company's coal 158 tons are "unaccounted for;" but

this is explained by the experts, who say (see testimony quoted, page 83) that this coal was probably carried on work trains; and hence no record of unloading was kept. But it must be remembered that the Central's Counsel had agreed to the fact as true that the coal was delivered along the Central lines, and thus assumed the onus of showing any exception to that rule; and any deficiency or failure of proof, leaving any coal "unaccounted for," operates against the Central.

Hence, we say that except with reference to the coal used at Augusta, there is not the slightest evidence in the record to show that any except the Central Railroad obtained the benefit of the coal shipped by the Intervenors. The fact that a large amount of coal belonging to these Intervenors was found on the Central bins by the experts, and the fact that the cars which had been started from the mines prior to the 4th of March, 1892, were taken possession of when they arrived by the agents of the Central's Receivers, shows conclusively that the coal was so shipped as to reach the proper bins on the Central.

It only remains to consider the liability of the Central for the coal, which was used at Augusta by the three railroad companies above mentioned.

1st. As to the Port Royal & Augusta and the Port Royal & Western Carolina, which will be considered together because they stand precisely on the same footing:

(*a*) The lease shows that the stock of these two railroads was transferred by the Central to the lessee (see pages 18-19.) The Central filed its dependent bill in which it alleged that it controlled these railroads, and that they were a part of its system, and these railroads filed answers sworn to by their officers, in which they stated (pages 10-11) that they admitted that the Central was the owner of their stock and bonds, and that the Central operated these railroads as a part of its system.

The Receivership of the Central was extended over these two roads, and they were operated by the Receivers up to as

late as June 16th, 1893, at which time they were discharged by the order of Judge Pardee.

By this late date all the coal that had been shipped in pursuance of the contract, had been long ago consumed, and therefore the subsequent discharge of these railroads from the Receivership does not seem to be material.

We insist in view of the above evidence as to the relation of these two corporations to the Central that if the Central is bound under the contract, or under the rule in Fosdick vs. Schall, or under the Statute of Georgia, then it is just as much bound for the coal which was used upon these two dependent and controlled lines, as upon any other part of this system.

Apparently, the Circuit Court resolved this contention in our favor, for the opinion states, with reference to the coal received by the Receivers:

"It is true that some of this coal was delivered to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad, and perhaps other railroads, but they were roads under the control of the Central, and were operated as a part of its system, and these roads have no doubt accounted to the Receivers for the coal which they received." (Page 234.)

As to the coal used by the Charlotte, Columbia & Augusta Railroad Company, the Central is, of course, liable, if we are right in the argument heretofore made, namely: that the Central was bound by the contract, either directly by its terms, or bound by it because made by the Richmond & Danville, or otherwise; because if the contract was binding, then the Central is liable to the Intervenors, even though it may have sold a part of the coal to another railroad company. The Court will have no hesitation in reaching the conclusion that in parting with the coal the Central in some way received consideration for the same. The coal was either sold to the Charlotte, Columbia & Augusta, or it may have been loaned to them in conformity with the usage to which reference has already been made, and

any uncertainty as to the proof makes the Central liable, by virtue of the agreement of counsel as to the fact of delivery to the Central.

If, however, the Court should be of the opinion that, under the rule of Fosdick against Schall, the Central is only liable for that portion of the coal which used upon its own lines, then it is undoubtedly true that the supplemental report of the Master will be sustained to the extent of deducting from his original report the value of the two thousand, one hundred and twenty-four tons of coal which was used by the Charlotte, Columbia & Augusta Railroad, and we respectfully insist that this certainly is the only exception that can be made to the liability of the Central for the entire amount of the coal.

The liability of the Central for the coal used on the Savannah & Western Railroad is too plain for argument. This corporation was made a party at the hearing by amendment (p. 5), and its line was operated by the Central's Receiver from that date.

VIII.

If the contract is not the measure of the rights of both parties, then the Intervenors are entitled to recover from the Receivers the value of the coal on the bins and of that which arrived after the Receivership, to-wit, the full market value at the places of delivery.

If the preceding argument does not state the law of the case, Intervenors claim that, independent of the contract and because the contract is rejected as the basis of their rights, they have a claim arising on *quantum valebat* against the Receivers of the Central for the value of their coal on the bins March 4th, 1892, and that which they accepted upon arrival in car loads after that date.

The facts upon this branch of the case are set forth in the Statement. It is to be noted that the Receivers filed no answer to the verified amendment alleging that they took possession of

a large amount of Intervenors' coal which was unpaid for, nor to the petition alleging that their books, coal chute reports, etc., would show the amount of such coal. They contented themselves solely with a criticism upon the proof offered by Intervenors.

(*a*) The division or mutual quit-claim agreed upon by the coal companies (page 142) was the only possible method of prorating. It was perfectly fair to the Receivers, because under no circumstances could they be charged with more than the amount of coal proved to be on the bins.

(*b*) The evidence was satisfactory to the Master. His finding upon questions of fact, is *prima facie*, corrrect.

(*c*) The evidence was satisfactory to the Circuit Court; this inference is inevitable from the fact that the Court, although rejecting the Intervenors' claim, does not proceed upon the ground of a want of proof.

(*d*) The Circuit Court of Appeals deals with the proof as satisfactory.

Replying to the contention that the lessee got possession at the time of the lease of an equivalent amount of coal, we submit:

(*a*) There was no evidence that the Central turned over any coal to the lessee except the recital in the lease that the lessee took in the Central as a running road. Intervenors proved specifically and positively the amount of coal on hand March 4, 1892. If the fact that the lessee at the time of the lease, June 1, 1891, got possession of the Central's coal then on hand, was a matter of defense, then it was incumbent on the Central to show how much coal was on hand June 1, 1891. This was not done, nor attempted. Ryan testified that he had been making very heavy shipments—more than average shipments—just prior to the Receivership, and that the Central had a large amount of coal on hand March 4, 1892. If the coal on hand June 1, 1891, was used by the Central as a set-off, the Central should have shown at least that it was an equal amount.

(*b*) The argument that the Receivership should restore the status of the parties at the time of the lease is really an argument for the Intervenors. For while the lessee took the lessor's supplies as a running road, the lessee also assumed and paid the current debts for supplies. (Lease, page 28). Complete adjustment of the relations of the parties requires that the Central, which took the supplies March 4, 1892, should pay the current debts for those supplies.

The true view, however, is that this matter is wholly one for accounting between the Central and Danville, and it cannot affect in any way the rights of the Intervenors.

The mode of arriving at the amount of the coal on the bins has been set forth in the statement of facts. Expert testimony shows it was the only method possible, and that it was fair and just. There is no evidence tending to show that in the 18,426 tons on the bins, there was any coal that had been paid for. Ryan testified that the Central ususally kept on hand two or three weeks supply of coal (p. 95), so that the 18,426 tons on bins March 4, 1892, was coal that had been recently shipped, and which is represented by the later items in the account. The coal on hand, June 1, 1891, and the coal represented by the oldest items of the accounts of the coal companies had been consumed months before; and the supply renewed probably as often as ten times before the particular supply on hand March 4, 1892, was placed in the bins. The contract itself provides "settlements for the coal delivered in any one month, to be made on or about the first of the *second succeeding month.*" So that there is no ground for the contention that any of the coal had been on hand long enough to be paid for.

The Receivers were liable for this coal as well as for that which arrived after March 4, 1892. Their liability for the latter is not denied.

If the contract be ignored, then the claim of intervenors for the coal on the bins is a charge for which the intervenors have

a lien under the Act of 1876, section 2333 of the Code of Georgia, *antea*, according to the narrow construction of that statute, insisted upon by counsel for the Central; and since the claim rests on *quantum valebat*, it is a debt for the coal at its market value at the places of delivery.

When this question is raised, the logic of the counsel for the Central takes a complete somersault. Throughout the whole discussion, their argument ceaselessly reiterates Danville, *Danville*, DANVILLE. But when the intervenors assume that the contract is not in the case, and therefore charge the Central with the proven market value of the coal at the places of delivery, our opponents throw off the Danville cloak and in all the nakedness of truth exclaim, "We, *the Central*, hauled the coal, earned the freight which gave to the coal its enhanced value, and therefore, *we*, the Central, claim the benefit of the contract price."

If the intervenors can recover the market value at the places of delivery of the coal on the bins and that received after March 4, 1892, they will not insist upon their claim for the coal consumed prior to the Receivership. It is only by adopting and claiming under the contract that the Receivers escape an increased liability.

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for Appellants